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742-873—64—1

# In the Supreme Court of the United States

OCTOBER TERM, 1964

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No. 234

HAROLD ROTH, HERBERT S. STERNBERG, AND MILTON HOLT, PETITIONERS

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

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**BRIEF FOR THE UNITED STATES IN OPPOSITION**

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**OPINIONS BELOW**

The opinions of the court of appeals (Pet. App. R1–R9, H1–H8) are reported at 333 F. 2d 450 and 455.

**JURISDICTION**

The judgment of the court of appeals was entered on June 5, 1964. The petition for a writ of certiorari was filed on July 1, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether loans to petitioner Holt, arranged by petitioners Roth and Sternberg, and for which Holt neither paid interest nor gave security, were "thing[s] of value" within the meaning of Section 302 of the Labor-Management Relations Act of 1947.

2. Whether the provision of Rule 23(a) of the Federal Rules of Criminal Procedure, which permits a nonjury trial only with the approval of the court, is constitutional.

3. Whether the trial judge should have disqualified himself from presiding at petitioner Holt's trial.

4. Whether the evidence of petitioner Holt's guilty knowledge was sufficient to sustain his conviction.

## STATUTES AND RULE INVOLVED

Section 302 of the Labor-Management Relations Act of 1947, 61 Stat. 157, 29 U.S.C. 186, provides in pertinent part:

> (a) It shall be unlawful for any employer to pay or deliver, or to agree to pay or deliver, any money or other thing of value to any representative of any of his employees who are employed in an industry affecting commerce.
>
> (b) It shall be unlawful for any representative of any employees who are employed in an industry affecting commerce to receive or accept, or to agree to receive or accept, from the employer of such employees any money or other thing of value.

Section 302 of the Act was amended in 1959, 73 Stat. 537, 29 U.S.C. (Supp. V) 186, to read in pertinent part:

> (a) It shall be unlawful for any employer or association of employers or any person who acts

> as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—
>
> (1) to any representative of any of his employees who are employed in an industry affecting commerce * * *
>
> * * * * *
>
> (b)(1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a).

Rule 23(a) of the Federal Rules of Criminal Procedure provides:

> Cases required to be tried by jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the government.

## STATEMENT

In a six-count indictment returned in the United States District Court for the Southern District of New York, counts one, three, and five charged petitioners Roth and Sternberg with paying things of value to a labor union official in violation of Section 302(a) of the Labor-Management Relations Act, and counts two, four, and six charged petitioner Holt with being the labor union official who received the payments in violation of Section 302(b) of the same

Act (I R. 5–7; II R. 5(1–5(2)).[1] The trial of petitioners Roth and Sternberg was severed from that of petitioner Holt; the former were tried first before a jury, which convicted them on all three counts. Both were sentenced to serve concurrent terms of imprisonment—six months for Roth and two months for Sternberg—and to pay fines of $10,000 and $4,000, respectively. Service of the prison terms was suspended (I R. 83–86). Petitioner Holt was thereafter tried before a jury and was convicted on the three counts in which he was named. He was sentenced to concurrent suspended prison terms of six months and to pay fines of $10,000. The court of appeals affirmed all the convictions (Pet. App. R1–R9, H1–H9).

1. The pertinent evidence may be summarized as follows:

Petitioner Roth was the president of two corporations: (1) Continental Industries, Inc., an interstate vending-machine corporation whose employees belonged to a labor union local, the secretary treasurer of which was petitioner Holt, and (2) Valley Commercial Corporation, a subsidiary that discounted Continental's conditional sales contracts and which employed only two persons—petitioner Sternberg, who was its executive vice-president, and his secretary (I R. 10, 91–92; III R. 2, 5–6, 11, 17). Petitioner Sternberg

[1] The record is in three volumes, designated "I R.," "II R.," and "III R." Volume one is petitioners Roth and Sternberg's appendix in the court of appeals, volume two is petitioner Holt's appendix, and volume three contains the government's appendix in the Roth-Sternberg appeal as well as the opinions and judgments below.

was also employed by Continental as an executive whose responsibilities included signing the collective-bargaining agreement with petitioner Holt's union. Sternberg operated Valley Commercial from his offices at Continental (I R. 92–93; III R. 4–6).

In October 1957 petitioner Sternberg telephoned Frank Abrams, a Continental advisor and director who was a partner in an independent investment and finance firm. Sternberg arranged an interest-free "loan" of $30,000 from Abrams' firm to Holt. The security for the loan was a Valley Commercial check in the same amount, which was delivered to Abrams' firm. When Holt repaid the loan eight months later, Abrams' firm returned the $30,000 to Valley Commercial. In April 1959, Sternberg arranged another interest-free loan from Abrams' firm to Holt, this time for $54,600, and Sternberg again delivered a Valley Commercial check as security. That loan was repaid two days later, and Abrams' firm again returned the security to Valley Commercial. In May 1959, Sternberg arranged a third interest-free loan for Holt in the amount of $12,000 for eighteen days. On this occasion, Abrams' firm accepted Holt's own post-dated check, which was cashed when the loan fell due (I R. 9–18; III R. 2, 13).

In speaking to Abrams after the first transaction, petitioner Roth said that he had arranged for Sternberg to request the loan (I R. 16–17). Later, testifying before a Senate Committee, Roth said that Holt approached him about the loan, that he arranged for the loan, and that "[w]e actually made the loan indirectly" (III R. 12–14).

2. The Holt trial began three days after the conclusion of the Roth-Sternberg trial. On the day before his trial was to begin, Holt's counsel approached the bench and informed the district judge, who had presided at the earlier trial, that his client, having obtained the consent of the government, would waive a jury trial (I R. 78; II R. 11–12). The judge responded that he thought his participation in the Roth-Sternberg trial, where evidence incriminating Holt had been introduced, might disqualify him from trying the case without a jury (II R. 6–7, 12). This development, he suggested, might require him to reassign the trial to a different judge (II R. 6–7, 12–13). Later that same morning, government counsel informed the court that the government, "in the light of the circumstances," was withdrawing its consent to the jury waiver (II R. 14). Counsel observed that reassignment would cause unnecessary delay and would be a burden on the other district judges since a different judge would have to spend time studying the legal issues peculiar to the trial with which the present judge was already familiar (II R. 15–16). Later that day, the court announced (II R. 7):

> I am going to hold on to this case, but I am not going to accept any waiver of a jury, even assuming that it would be requested or sought and further acquiesced to by the United States here.

The judge later said (II R. 21):

> So that in view of the government's position I suppose there is nothing for me to do except I would indicate, in fairness, that even if the

> government had acquiesced here this morning, in response to this motion you just made, I would, it seems to me, to be consistent, have said, "Well, I am sorry, I won't take the waiver from either of you. I will insist that this go forward with a jury."

3. Except for petitioner Roth's out-of-court admissions and some of the testimony concerning the relation between Continental Industries and Valley Commercial, the evidence at petitioner Holt's trial was similar to that at the Roth-Sternberg trial.

**ARGUMENT**

1. Contrary to the contention of all petitioners, the transfers of money to petitioner Holt clearly violated Section 302. There is no occasion in this case to reach the issue that petitioners seek to present—whether Section 302, before its amendment, prohibited *bona fide* loans. For the court submitted these cases to the juries with instructions that authorized guilty verdicts only if more than a *bona fide* loan had been proved. The juries were instructed that petitioners were not guilty unless a monetary benefit or thing of value was conferred upon petitioner Holt; and in determining whether a thing of value was conferred, they were to consider the conditions and terms of the loan, including the interest charged and the security demanded.[2] When petitioner Holt obtained unre-

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[2] At the Roth-Sternberg trial, the instructions were (I R. 60–61):

"To put this another way, the government maintains that all the circumstances, all the evidence, prove beyond a reasonable doubt that the defendants intended to confer a benefit or thing

stricted use of large sums of money without paying any interest or providing any security, he obviously received a "thing of value." Such transactions have

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of value upon Milton Holt in the form of these not insubstantial sums of money to be used by him free of interest and without collateral, whereas, defendants urge that there was no particular one-sided benefit or thing of value under the circumstances and that these were legitimate, normal loans paid or caused to be paid by them to Holt in this capacity as principals of a finance company and that they knew, as such principals, that Holt was a good credit risk.

"In determining whether or not there was a thing of monetary benefit or thing of value conferred upon Holt, you can and you must consider all the surrounding circumstances as indicated by the evidence.

"For example, as to a particular count, if you find that there was a loan of money to Holt, you should consider the conditions, the terms of the loan, such as interest, term of the loan, duration of the loan, collateral or absence of collateral, security and the like. Also you should consider, to the extent that evidence indicates it to you, the underlying purpose of Holt in seeking and obtaining whatever money you find he did receive and also the use to which he put such money and the knowledge of this, if any, on the part of each defendant. There may be additional underlying factors or circumstances which you can perceive from the evidence to be pertinent here, and so long as you confine yourself solely to the evidence here admitted you are entitled to consider any such factor which you feel is of help to you on this particular issue."

At Holt's trial, the instructions were (II R. 126–127):

"Now, the second element which the Government must prove is that a 'one-sided benefit' or 'thing of value' was intentionally conferred upon Holt by the transaction set forth in the particular count being considered by you. To put this another way, the question for you to ask in considering this element is the following: Did Sternberg act with the purpose of conferring a one-sided benefit upon Holt, and, if so, did he through such acts, in fact, cause such a benefit to be conferred upon Holt through the transaction set forth in the particular count.

"Now, to go a little further about this, I instruct you that the mere making of a loan is not, standing by itself,

been prohibited by the statute both before and after the 1959 amendment, see *United States* v. *Fruehauf*, 365 U.S. 146, 156; *United States* v. *Carter*, 311 F. 2d 934 (C.A. 6), certiorari denied *sub nom. Felice* v. *United States* 373 U.S. 915. And the all-encompassing language of the statute left little room for doubt as to the meaning that an ordinary reader would impart to it.

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enough to constitute giving a 'thing of value' within the meaning of the statute being applied here. Rather, this element of 'thing of value,' if it exists at all, must be found by you in the circumstances underlying or surrounding the loan or transaction.

"When I speak of 'circumstances underlying or surrounding the loan or transaction,' I mean such things as the terms of the loan, the purpose of the loan, and any other factor which you may find from the evidence that bears on this point and which was known to the parties as being part and parcel of the transaction.

"Now, under this heading which I have called here the 'terms' of the loan, you may, of course, consider such factors as the amount of interest, if any, charged by the party making the loan and the collateral required, if any, as security for repayment of the loan. Moreover, if you find that the parties to the loan knew what the loaned money was to be used for, you can consider such use in deciding whether the making of the loan, under the terms imposed, was a one-sided benefit or thing of value.

"Of course, there may be other, additional, factors or circumstances which you can perceive from the evidence as being relevant to this element which I call the 'thing of value.'

"I do not mean to foreclose you from considering these other facts or circumstances. You may consider any such factor, as long as you confine yourself to the evidence before you, in determining whether the underlying reality behind the particular transactions was that a one-sided benefit or thing of value was being knowingly conferred upon Milton Holt."

2. It appears from the record that the court's decision to reject petitioner Holt's jury waiver did not turn on the government's acquiescence or non-acquiescence. The trial judge stated explicitly that he would impanel a jury irrespective of whether the government joined in the request for a nonjury trial (II R. 7, 21). This determination was based on considerations of fairness and of judicial administration, since the judge's principal concern was whether he could fairly act as a fact-finder in Holt's trial after having heard the evidence in the Roth-Sternberg trial. Since the circumstances did not warrant his disqualification (p. 11, *infra*), the trial judge adopted the procedure which would be most likely to insure a fair trial for the defendant.

Hence, petitioner Holt's principal contention is, in substance, that Rule 23(a) of the Federal Rules of Criminal Procedure is unconstitutional to the extent that it conditions a nonjury trial in a federal criminal case on "the approval of the court." This argument is related to the issue to be considered by the Court this Term in *Singer* v. *United States*, No. 42, certiorari granted, 377 U.S. 903, which involves the constitutionality of the provision of Rule 23(a) requiring "the consent of the government" for a nonjury trial. We believe that the two issues are distinguishable, so that even if this Court were to reverse the judgment in *Singer* it could properly sustain the judgment in the

present case. However, the petitioner in *Singer* contends, *inter alia*, that a criminal defendant has an unqualified right to a nonjury trial—a contention which bears upon this case as well. Accordingly, we suggest that disposition of Holt's petition await this Court's decision in the *Singer* case, which, we understand, is likely to be reached for argument in the near future.

3. Contrary to petitioner Holt's second contention, the district judge had no reason to disqualify himself. The judge was confident that he could rule fairly on the motions and the admission of evidence. His only concern was to make certain that no "human or psychological" factors would enter the determination of the ultimate issue of guilt or innocence (II R. 8–9, 16–17). These considerations, which exist whenever a judge must hear evidence that he would not be permitted to consider as a factfinder,[3] do not constitute grounds for disqualification under 28 U.S.C. 144. Consequently, it was proper for the court to deny the motion for disqualification, particularly after having determined that the case could be fairly tried to a jury.

[3] If, for example, there is a dispute in a nonjury case over the admissibility of a confession, the court would be required to hear the testimony regarding the confession in order to rule on the admissibility question. It could hardly be contended that if the confession is ruled inadmissible the judge must disqualify himself because he has heard incompetent evidence.

4. The evidence was sufficient to prove that petitioner Holt knew that the money came from an employer of employees whom he represented which is all the guilty knowledge that is required. Since the evidence showed that Continental's collective-bargaining agreement had been signed on its behalf by Sternberg and on behalf of the union by Holt, the jury could conclude that Holt knew that Sternberg was representing Continental, the actual employer of members of Holt's union (II R. 99). In addition, when Holt arrived at Abrams' office, he announced that he was "Mr. Holt about whom Sternberg of Valley Commercial spoke * * *" (II R. 43–45).[4] Abrams, after informing Holt that the loan was being made on behalf of a client, promptly issued a $30,000 loan without charging interest, without asking for security (except for a note signed by petitioner Holt's wife), and without investigating his credit background (II R. 46–49). The pattern was

[4] There is no merit to Holt's contention (Pet. 72–75) that testimony regarding the telephone conversation between Sternberg and Abrams was inadmissible hearsay. This testimony was within the well-settled exception to the hearsay rule that statements made by a partner to a joint venture, and in furtherance of it, are admissible against all partners to the venture. *United States* v. *Annunziato*, 293 F. 2d 373, 378 (C.A. 2), certiorari denied, 368 U.S. 919; *United States* v. *Puglisi*, 153 F. 2d 497, 500 (C.A. 2); cf. *St. Clair* v. *United States*, 154 U.S. 134, 149. That Sternberg and Holt were engaged in a joint venture was proved independently of any statements by Sternberg. When Holt later appeared in Abrams' office to raise the money, he announced himself as Mr. Holt about whom Sternberg of Valley Commercial had spoken about a loan (II R. 44–45).

repeated in April and May of 1959 (II R. 57–64).[5] The jury could infer that under these suspicious circumstances Holt was well aware of the real source of the loan.

The only knowledge required for a violation of Section 302(b) is that the union representative know "(1) that he was receiving or accepting money, and (2) that the person who was giving him the money was an employer of employees that he represented." *United States* v. *Ryan*, 128 F. Supp. 128, 133 (S.D. N.Y.), affirmed, 232 F. 2d 481 (C.A. 2); *United States* v. *Carter*, 311 F. 2d 934, 943 (C.A. 6), certiorari denied *sub nom. Felice* v. *United States*, 373 U.S. 915. Those standards were patently met in this case.[6]

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[5] There was no evidence that in April or May 1959 petitioner Holt announced that he had been sent by Sternberg; however, that omission is not material since a pattern had been established that followed the original transaction in October. In any event, petitioner's sentence under the counts charging the two 1959 transactions ran concurrently with his sentence under the count charging the original transaction. See *Lawn* v. *United States*, 355 U.S. 339, 359.

[6] Contrary to petitioner Holt's claim, the jury instructions on knowledge were correct. The judge charged (II R. 130):

"* * * Assuming that a thing of value was conferred upon Mr. Holt and assuming, further, that this was done on behalf of an employer company or companies, did Mr. Holt actually know when receiving this thing of value both that it was a thing of value and that it was being conferred on behalf of an employing company or companies employing workers represented by him, Milton Holt."

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petitions of Roth and Sternberg should be denied, and that disposition of the petition of Holt should await this Court's decision in *Singer* v. *United States,* No. 42. Should the Court decide, however, to grant the Holt petition and set it for argument together with *Singer,*[7] such an order should be limited to questions 3 and 4 of the petition.

ARCHIBALD COX,
*Solicitor General.*

HERBERT J. MILLER, JR.,
*Assistant Attorney General.*

BEATRICE ROSENBERG,
THEODORE WIESEMAN,
*Attorneys.*

AUGUST 1964.

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[7] We note, in this regard, that there is presently pending another related case, *Igoe* v. *United States*, No. 145, this Term. Although we suggested that disposition of *Igoe* await the decision in *Singer* (Memorandum for the United States, No. 145, p. 3), the Court might prefer, if it grants the present petition and sets it for argument with *Singer*, to consider the question in yet another factual context by granting the petition in No. 145 as well.

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